A.Nos.248 to 250 of 2003, 61 of 2004, 232 of 2006,
188 of 2008, 112 of 2009, 166 of 2009
in IP.No.34 of 2001

C.V.KARTHIKEYAN, J

A.No.112 of 2009:- This application has been filed under Order 14 Rule 8 of the Original Side Rules read with Section 17 of the Presidency Towns Insolvency Act, 1909, seeking permission to institute the intending suit against the Insolvent and others for specific performance of the Joint Venture Development Agreement, dated 27.6.1996 against the 1st Defendant K.Balakrishna Rao, who had been adjudicated as an Insolvent by this court in IP.No.34 of 2001, by order dated 22.3.2001 and the secured creditors, Indian Bank and other beneficiaries of the property situated at No.67, 68, 68A, Purasawalkam High Road, Chennai-7.

2. In the affidavit filed in support of this application in A.No.112 of 2009, it had been stated that the Applicant had filed the above intending suit to pass a judgement and decree, against the Defendants/ Respondents:-

> "a. directing the Defendants 1 to 4 to specifically perform their obligations arising out of the joint venture development agreement dated 27.6.1996 in respect of Schedule mentioned 'A' property, which is more fully described in the plaint schedule here under by executing a deed of sale and register a valid conveyance in favour of the Plaintiff or its nominee or nominees either divided or undivided on receipt of the balance sale consideration of Rs.201 lakhs on a date to be fixed by this court and or in default, direct an officer of this court to convey the suit schedule mentioned property on behalf of the Defendants 1 to 4 herein in favour of the Plaintiff or its nominee or nominees either divided or undivided on remittance of the balance sale consideration of Rs.201 lakhs payable by the Plaintiff to the Defendant 1 to 4 herein on a date to be fixed by this court.

b. granting mandatory injunction directing the Defendants 1 to 4 to discharge the loans payable by the 1st Defendant to the 5th Defendant in respect of the schedule mentioned 'A' property forming the subject matter of the Original Applications in OA.Nos.78, 533, 173, 95 and 128 of 2007 in Debts Recovery Tribunal III, Chennai, as per the terms of the contract dated 27.6.1996 and thereby retrieve the documents and deliver the same to the Plaintiff at the time execution and registration of the sale deed in favour of the Plaintiff.

c. granting permanent injunction restraining the Indian Bank, Purasawalkam Branch, Chennai-7, from proceeding as against the property, more fully described in the schedule without reference to the joint venture development agreement dated 27.6.1996.

d. granting permanent injunction restraining the Defendants from interfering with possession and enjoyment of the property of the Plaintiff more fully described in the schedule."

3. It had been stated that the suit schedule property originally belonged to late K.Seetharama Rao, who by a settlement deed, had settled the property in favour of his son K.Balakrishna Rao, the 1st Defendant. At this juncture, it must be pointed out that this application had been filed in the year 2009 and in the interregnum period between 2009 and 2016, among the intended Defendants in the said suit, namely, the 1st Defendant K.Balakrishna Rao, who is the Insolvent and the 2nd Defendant, Meera Balakrishna Rao, who is the wife of the 1st Defendant, had both expired. The suit continues against the Defendants 3 and 4, who are the daughters and who, it is represented, are the only legal representatives of the deceased Defendants 1 and 2. As stated above, K.Seetharama Rao had settled the property by the settlement deed dated 31.7.1962 registered as Doc.No.3831 of 1962 in the registration Sub

District of West Madras, Periamet. It had been further stated that the said Balakrishna Rao was holding the property for himself and his family members, namely, his wife, Meera Balakrishna Rao and his two daughters, Thulsi Reddy and Sudha. The said Balakrishna Rao was carrying on his hotel business in the name of 'Dasha Prakash' and was carrying on the said business at Chennai, Mysore, Delhi, Agra and other places. During the course of his business, he had availed financial assistance from the Indian Bank, Purasawalkam Branch, Chennai. The said Indian Bank had been shown as the 5th Defendant in the intending suit. While availing such financial assistance, the suit schedule property was offered as security. Thereafter, since he was not able to discharge his liability to the Indian Bank, he had entered into a joint venture development agreement with the Applicant herein, which was at that time called as Rainbow Holiday Resorts International Limited. This joint venture development agreement is dated 27.6.1996 and the property, which had been offered as security to the Indian Bank, was the subject matter of the joint venture development agreement. It had been further stated that the market value was fixed at Rs.4 crores and it was agreed that the constructed area was to be shared between the two parties in the equal ratio.

4. In the agreement itself, it has been disclosed that the property is subject to mortgage by the Indian Bank. It had been further represented that a sum of Rs.563 lakhs was the amount payable to the Indian Bank. It had been further stated that the Applicant and the 1st Defendant had agreed to settle the Indian Bank in one time settlement through the development of the property. It

had been further stated that pursuant to the joint venture development agreement, the Applicant had paid a sum of Rs.1,99,76,774/- and there was a balance of Rs.201 lakhs and it had also made a payment of Rs.50 lakhs in two instalments to the said Balakrishna Rao. Thereafter, the Applicant herein had demolished the existing building and put up new constructions. Sale deed were also entered into with the prospective purchasers and shops were constructed and the said purchasers were also put in possession. The entire 2nd and 3rd floors had been put up by the Applicant and the Applicant claims ownership to the same.

5. It had been further stated that there is no dispute over the fact that it was the Applicant herein who had constructed the building. It had been further stated that thereafter, after entering into the said agreement with the Applicant and after receiving huge sums of money and after constructions were put up, the said Balakrishna Rao had filed IP.No.34 of 2001 and got himself adjudicated as an Insolvent. This naturally changed the relationship between the parties and also the status of the property which was the subject matter of the joint venture development agreement. In these circumstances, since pursuant to the order of adjudication, the property had vested with the Official Assignee, this application has been filed to enforce the joint venture development agreement entered into with the said Balakrishna Rao and accordingly, leave is sought under Section 17 of the Presidency Towns Insolvency Act, 1909.

6. This court heard Mr.R.Thiagarajan, the learned counsel for the

Applicant, the Deputy Official Assignee and also Mr.Jayesh Dolia, the learned counsel representing the Indian Bank, which is the secured creditor and also Mr.J.Balagopal, learned counsel representing the Insolvent.

7. At the outset, it is relevant to extract the provisions of Section 17 of the Presidency Towns Insolvency Act, 1909 as under:-

> **"17. Effect of order of adjudication.-** On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose:
>
> Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed. "

8. In this connection, one further fact which today stands out, is that the Defendants 1 and 2 shown in the plaint had died. It is therefore seen that the Insolvent who had adjudicated himself as an Insolvent is no more. The estate has vested with the Official Assignee. It is seen from the various reports filed by the Official Assignee and also by the Applicant herein that the Official

Assignee had taken possession of the property. However, it is seen that as many as 42 shops are in possession of the purchasers of the shops and thereafter, there are 37 vacant shops and these shops have been sealed by the Official Assignee. The suit now filed by the Applicant is to enforce the joint venture development agreement, for which he seeks leave of this court to institute the said suit.

9. Earlier in a separate insolvency petition in IP.No.15 of 2004, this court, while considering the provisions of Section 17 and also its scope, in the very similar circumstances, had stated that leave can be granted and it is pursuant to the leave that the parties will have to work out their remedies. The very same position has also been affirmed by the Honourable Supreme Court in **2011 (1) SCC 428 (J.P.Builders Vs. Ramadoss Rao and others)**, wherein it had been stated that at the time of grant of leave, prima facie case alone will have to be seen and the rights of the parties will have to be subjected to the decision taken in the suit.

10. A reading of the plaint, which is intended to be filed, shows that the Applicant had spent substantial amounts of money pursuant to the joint venture development agreement and after demolishing the building, he had put up constructions and he had sold 42 shops to the purchasers, who were nominated by K.Balakrishna Rao and thereafter, 37 shops will have to be sold. He is in further possession of the 2nd and 3rd floors. In all these circumstances, in order to afford fair trial and fair opportunity to all the parties concerned, this application in A.No.112 of 2009 is allowed and leave is granted as prayed for.

11. The Applicant has taken out various applications in A.Nos.248 to 250 of 2003 all with respect to the joint venture development agreement. These applications will not survive and if the Applicant so intends, he may take out separate applications in the plaint, for institution of which, leave is hereby granted. Therefore, A.Nos.248 to 250 of 2003 are dismissed.

12. A.No.188 of 2008 in A.No.232 of 2006 has been filed by the Indian Bank under Section 7 of the Presidency Towns Insolvency Act, 1909 to vacate the order of interim injunction dated 24.4.2006 in A.No.232 of 2006 in IP.No.34 of 2001.

13. In the affidavit filed in support of this application in A.No.188 of 2008, the General Manager of the Indian Bank had stated that the Insolvent on his own petition had been declared as an Insolvent by order dated 22.3.2001 and the assets of the Insolvent now vest with the Official Assignee. It has also to be pointed out that as on date, the Insolvent is no more. The Indian Bank, which had filed this application, had advanced the loan to the Insolvent, which amounted, as on 31.12.2006, to Rs.71,03,53,706.10/-. For recovery of the said amount, the Applicant had filed 8 suits in DRT, Chennai, DRT, New Delhi, DRT, Bangalore. The suit numbers are OA.Nos.254, 2207, 255, 390, 437 of 2001 at Chennai, OA.Nos.523 and 415 of 1997 at New Delhi and OS.No.5219 of 1997 at City Civil Court, Bangalore. It had been further stated that the DRT, Chennai had also attached the property on 11.2.2005 and recovery certificate had also been issued on 20.7.2005. At that juncture, the 1st Respondent, who is the Official Assignee, had filed an application in A.No.232 of 2006 for obtaining an

order of interim injunction restraining the Bank and Recovery Officer from bringing the schedule mentioned property for sale. This court had also granted an order of interim injunction on 24.4.2006. This application has been filed to vacate the said order.

14. It had been further stated that the Applicant Bank had issued a notice under Section 13(2) of the SARFAESI Act on 12.1.2007. It had been further stated that the Indian Bank is the mortgagee and stands outside the insolvency petition. Being a secured creditor, the Indian Bank has a right to invoke the provisions of the SARFAESI Act. It had been further stated that the interim injunction order should be vacated.

15. This court heard Mr.Jayesh Dolia, the learned counsel for the Applicant and the Deputy Official Assignee.

16. It is an admitted fact that the property, which is vested with the Official Assignee, has been the subject matter of a mortgage with the Applicant Bank. Section 17 of the Presidency Towns Insolvency Act, 1909 has reserved the right of a secured creditor to proceed independently of the insolvency proceedings. There is an inherent right available to him to secure the loan given by him. This contention has been upheld in **2006 131 Company Cases 451** that the right to recover money by enforcing a mortgage is a right to enforce an interest in the property and that cannot be taken away.

17. Even under Section 48 of the Transfer of Property Act, the right of the first charge holder alone shall prevail over the claim of the 2nd charge holder and the Indian Bank being a secured creditor has inherent right to bring

the property for sale. Further, in **2004 (4) SCC 31 (Mardia Chemicals Vs. Union of India)** and again in **2006 (5) CTC 753 (Transcore Vs. Union of India)** the provisions of the SARFAESI Act has been upheld by the Honourable Supreme Court. The interim injunction granted in favour of the Official Assignee stands in the way of the Indian Bank from bringing the property for sale. Therefore, I hold that the contentions of the Applicant bank has to be upheld and consequently, I hold that the interim injunction order dated 24.4.2006 made in A.No.232 of 2006 has to be vacated and accordingly, it is vacated and this application in A.No.188 of 2008 is therefore allowed. Consequently, A.No.232 of 2006, A.No.166 of 2009 and A.NO.61 of 2004 are dismissed.

21.12.2016

Index:Yes/No
Web:Yes/No
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C.V.KARTHIKEYAN, J.

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Pre-Delivery Order in
A.Nos.248 to 250 of 2003,
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